IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

DEC 10 1979

No. 79-746

CHARLES N. BUCHHOLTZ AND LESTER J. TAUER, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Petitioners,

vs.

SWIFT & COMPANY AND AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,

Respondents.

BRIEF IN OPPOSITION FOR RESPONDENT AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO.

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BRIEF IN OPPOSITION FOR RESPONDENT AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO.

The respondent Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (hereafter "Amalgamated") asks the Court to deny the petition for writ of certiorari which seeks a review of the Eighth Circuit's decision.

QUESTIONS PRESENTED.

The statement of the questions presented in the petition is in each instance framed so argumentatively, and so extensively subsumes facts not developed at trial or found by the Court below, that this Respondent believes that Petitioners' formula-

tion is inadequate. There is no evidence, for example, that any "settlement proceeds" were "appropriated", as Petitioner states; there is no evidence that a grievance claim for wages was traded for an equivalent amount of "gratuitous" pension benefits; and there is no pleading on file, and no evidence in the record to suggest, that the district court was acting as a substitute for an arbitrator. Respondent believes the questions presented by the petition would more appropriately be stated as follows:

1. Whether Amalgamated breached its duty of fair representation by settling and withdrawing the vacation pay grievance short of arbitration where it had concluded, upon consideration of the explicit contract language, bargaining history and the opinion of counsel, that a violation of the contract could not be established and, consequently, the arbitration could not be won.

2. Where the court of appeals concluded the denial of vacation pay was not a violation of the collective bargaining agreement and thus, necessarily, that the grievance which the Union failed to arbitrate had no merit, whether the Union should nevertheless be held to have violated its duty of fair representation by failing to pursue the grievance to arbitration.

STATEMENT OF THE CASE.

The plaintiffs sued to recover vacation pay under a collective bargaining agreement entered into between the Respondent Swift & Company (hereafter "Swift") and Amalgamated. Nowhere in the statement of the case at pages 3-11 of the petition is there any reference to the specific provisions of the vacation pay clause of the contract.

The crucial vacation pay provisions appear in the opinion of the court of appeals at pages A-13 to A-14 of the printed Appendix filed with the petition. That contract language provides that in order for an employee to have received vacation pay he had to fulfill *both* of two conditions: (1) he had to have been

on any payroll of the company (active or benefit) for 270 calendar days and (2) he had to have been on the *active* payroll on December 28 (Section 32). While the statement of facts in the opinion of the court of appeals is essentially correct, we believe a few additional facts ought to be emphasized.

Swift announced on May 29, 1967 that it would close its South St. Paul plant on November 29, 1969. The local union filed a catch-all grievance for "all vacations, pensions, holidays, S & A, and any and all other benefits and all monies lost due to the announcement of closing and the closing pursuant thereto." In support of the vacation claim, the local union asserted that all employees who worked in 1969 were entitled to 1970 vacation pay even though they could not be on the active payroll on December 28, 1969 because of the plant's closing in November.

The explicit contract language, as noted, denied vacations to any Swift employee not on the active payroll on December 28th. Over the years Amalgamated had repeatedly attempted without success, in successive periodic renegotiations of the agreement, to eliminate the qualifying date and to substitute a concept of pro-rata vacations. Written contract demands made by the union to eliminate the qualifying date were rejected by the company in bargaining. Only in 1973, in fact, four years after the plant closing in the case at bar, did the union finally succeed in negotiating a change in the agreement. The 1973 contract provided for pro-rata vacations in plant closing situations. VI App. 2919.[1]

Between 1949 and 1969 Swift closed more than 35 meat packing plants. In each instance Swift refused to pay vacations

1. The record in the court of appeals consisted of six volumes numbered I through VI. References to the Appendix filed with the petition will be preceded by the abbreviation "App." and then the page number.

to employees who were not on the active payroll on the qualifying date.[2]

The record shows that Amalgamated had been well aware, during all of the years of its collective bargaining relationship with the Company, of the problems caused by plant closings and had constantly pushed for improved closing-benefit provisions in the contract. Under provisions which consequently had become incorporated in the contract, employees who were terminated by Swift when its South St. Paul plant closed acquired the right to transfer to another plant; the opportunity to be placed on a company-wide waiting list for job openings at new plants; the right to a pension; the right to a very substantial separation allowance; the right to 26 weeks advance notice of plant closings; and the right to an eight week gratuity for employees retiring. VI App. 2772. The undisputed evidence showed that those provisions were totally and fully performed by Swift. See the court of appeals opinion at App. A-21.

Finally, it should be pointed out that no one involved in the decision to withdraw the vacation pay grievance and to conclude a settlement with Swift believed that the vacation pay grievance could be won in arbitration. Two very experienced attorneys who had handled hundreds of arbitrations in the meat packing

2. The sole exception occurred at Swift's plant in Sioux City, Iowa in 1968. The closing occurred on December 21, 1968—one week before the December 28, 1968 qualifying date. Employees had the right (as they also did in the closing in the case at bar) to transfer temporarily to other Swift plants. Due to the proximity of Sioux City to Omaha, employees threatened to transfer en masse for one week to the Company's Omaha plant, thereby remaining on the active payroll until the qualifying date to collect 1969 vacation pay. This would have produced economic chaos and disrupted operations at Omaha. Faced with the threat of mass transfers, the company agreed to pay vacations for employees who were on the active payroll as of December 21. The settlement agreement provided that it did not constitute a precedent. Sioux City employees, however, who quit prior to December 21 in anticipation of the closing and employees on the "benefit" payroll (as distinguished from the active payroll) on December 21 did not receive 1969 vacations for the reason they were not on the active payroll on December 21 as the settlement agreement required.

business testified that the grievance could not be won. IV App. 1727-1729; 1756-1761; 1904. A vice president and director of the Packinghouse Department of Amalgamated told the local union grievance committee that "we had a loser"; to an international vice president there was not a "Chinaman's chance of winning an arbitration in a case of that kind"; and, although the local union president felt Swift had a "moral obligation" to pay the vacations, he recognized that it was not an obligation under the contract. Just as importantly, even to one of the class representatives (Buchholtz) who filed this suit, the grievance was a mere "shot in the dark" and to the other class representative (Tauer) it was not "unreasonable or arbitrary on the part of the Defendant International Union" to conclude that under the contract "in all likelihood the arbitration of the prorated vacation pay issue would have been lost". IV App. 1601-1602.

REASONS FOR DENYING WRIT.

The Opinion of the Court Below Conflicts with No Decision of This Court.

The issue underlying the entire dispute is whether or not the employees at Swift's South St. Paul plant in 1969 were entitled to receive payment for vacations. The court of appeals concluded that they were not. There simply cannot be any serious contention that the language of the collective bargaining agreement in force at that time would permit any other decision. Despite repeated attempts over the years by Amalgamated to change it, the language was crystal clear. The employees *had to be* on the active payroll on December 28, 1969 in order to qualify. The agreement had been consistently so interpreted for 20 years. The plant was closed on November 29, 1969, and, with the exception of a small remaining force, all employees were terminated.

Relying on decisions awarding vacation pay in other instances, ignoring the particular language of the contracts in issue in those

cases, petitioners argue that this Court should now enunciate an immutable and universal eligibility rule for "vacations" outside the context of the particular language in a collective bargaining agreement. In short, they ask this Court to do what the district court did (and what the Court of Appeals refused to do) i.e., to excise the December 28 qualifying date from the contract and, after the excision, conclude that in all probability the vacation grievance would have been won in arbitration. Thus petitioners argue that the grievance did have merit, and the Union violated its duty of fair representation in declining to arbitrate.

It is clear that the opinion of the court of appeals is precisely in line with thirty-five years of precedent beginning with *Steele* v. *Louisville & N. R. Company,* 323 U. S. 192 (1944) through *Vaca* v. *Sipes,* 386 U. S. 171 (1967) and, most recently, *Hines* v. *Anchor Motor Freight, Inc.,* 424 U. S. 554 (1976).

The petitioners go further and urge that this Court should hold the Union violated its duty even if the court of appeals correctly decided that the collective bargaining agreement did not entitle petitioners to vacation pay. They suggest that the Eighth Circuit's reliance on *Hines* v. *Anchor Motor Freight, Inc.,* 424 U. S. 554 (1976) is misguided. In *Hines* this Court held that in order to prevail in an unfair representation suit employees "must show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the union. As the District Court indicated, this involves more than demonstrating mere errors in judgment." 424 U. S. 570-571. Thus, this Court has held, if there is no violation of the contract, *a fortiori* the union cannot be held for damages for failing to prosecute a meritless grievance. The court of appeals decision in the instant case is no way in conflict with *Hines* or any other decision of this Court. The petitioners have not cited, and cannot point to a single decision in which this Court has ever held that a union violated its duty of fair representation in failing to pursue an insupportable claim of contract violation.

The Eighth Circuit held, in the case at bar, "because there was no contractual obligation on the part of Swift to pay the vacation pay, that under the circumstances of this case and considering the duty of the union to fairly represent the older employees too, the union could not be held guilty of unfair representation," citing *Hines.* App. pp. A21-22. The court below thus recognized that unions must be given discretion to make judgments as to what grievances to file and how far they should be pursued. That discretion, under settled principles, may not be interfered with by the courts except where the union's decision in settling or withdrawing a grievance is motivated by bad faith, discrimination, arbitrariness or other invidious considerations. This Court made that doctrine clear even before *Vaca* v. *Sipes. Ford Motor Company* v. *Huffman,* 345 U. S. 330 (1953). Employees represented by unions do not have an absolute right to have the union process any and all grievances which the employee may choose to present and, conversely, the union has no duty to process each and every grievance.

With reference to the fact that the Union was able to persuade the Company to grant pension benefits to long-service employees in their fifties who were slated for termination in the final phase of the closing, but who were just short of meeting the age requirement for pensions, although the Union could not persuade the Company to pay the vacations claimed by petitioners, the Eighth Circuit in its amended opinion also recognized the dilemma so often faced by unions when they achieve benefits for one group while leaving another disgruntled. As the court said of the Union's accomplishment in this respect: "It made the best of a contract it had been trying to change for several years without success." Appendix, page A-23.

This Court has long recognized the difficulties faced by unions in such cases. "The complete satisfaction of all who are represented is hardly to be expected." *Ford Motor Company* v. *Huffman,* 345 U. S. 330, 337-338 (1953). *See also Humphrey* v.

Moore, 375 U. S. 335, 349 (1964); *Simberlund* v. *Long Island Railroad Company*, 421 F. 2d 1219 (2nd Cir. 1970); *Cunningham* v. *Erie Railroad Company*, 266 F. 2d 411, 417 (2nd Cir. 1959) and the Eighth Circuit's decision in *Corcoran* v. *Allied Supermarkets, Inc.*, 498 F. 2d 527, 530 (8th Cir. 1974).[3]

The opinion of the court below is not in conflict with any decision of this Court.

3. Petitioners repeatedly suggest the notion that their vacation claim represented a value of $1,053,000 which was "swapped" for what the Petitioners deem to be $920,000 worth of pension benefits achieved for other employees. This, of course, conveniently overlooks two facts: (1) in the light of the contract language, the bargaining history and the 20 years practice of the parties (and as ultimately affirmed by the Court of Appeals) the vacation claim was without merit under the contract, and represented little or nothing in value that could be "swapped"; and (2) the Company witnesses testified, without contradiction, that in their decision to grant the pension benefits, they took into account not the attribution of any value of the vacation claim but rather (a) the fact that the employees who were to receive the pensions would waive their rights to substantial amounts in severance pay and (b) that, in any event, the pension benefits would be paid out of a pension fund and not out of current Company profits. III App. 1223-25; IV App. 1658-59, 1702-09.

Thus, insofar as petitioners suggest that they, and not the prospective pensioners, should have received any benefits "swapped" in return for their vacation claim, the fact is that their vacation claim represented nothing of value for which the Company was ever willing to pay anything to them. On the other hand, even if it could be said that the Company, having indicated its willingness to make the new pension benefits available (because it felt that there was only a minimal cost to the Company), played "hard ball" in the bargaining process by also indicating that it would do so only if relieved of the nuisance of arbitrating a meritless grievance, it might well be asked whether the prospective recipients of the pension benefit might not have presented a contention of unfair representation if the Union had elected to deprive them of the pension benefit merely to satisfy the petitioner's insistence on arbitrating a grievance recognized to be without merit and not worthy of arbitration.

The Opinion of the Eighth Circuit Is Not in Conflict with Cases Decided by the Sixth Circuit.

The court below said it chose not to follow a line of authority which would pro-rate vacation benefits on the basis of a company's unilateral action in closing a plant. It cited the Sixth Circuit's decisions in *Schneider* v. *Electric Auto Lite Company*, 456 F. 2d 366, 372 and *Baldwin-Montrose Chemical Company* v. *International Union, United Rubber, Cork, Linoleum and Plastic Workers*, 383 F. 2d 796, 798 (1967). It said it did not agree with the reasoning of those cases and, moreover, in neither of those cases was there any discussion of bargaining history or past practices in related situations. The court said it was clear from the bargaining history between Swift and Amalgamated and the past practice between them, the facts relating to which were not seriously controverted, "that the union and its members *knew* or should have known that the contract did not provide for vacation benefits upon the closing of the plant, bargained to obtain them, and settled without the requested change." Appendix, page A-21.

On reasonable analysis it becomes apparent that the Eighth Circuit's decision in the case at bar is not in conflict with either of the cited Sixth Circuit decisions. *Schneider* was a class action arising out of the permanent shutdown of a plant in Toledo involving claims for lost wages, vacation pay, pension rights and insurance benefits under a collective bargaining agreement. The contract, however, contained provisions giving vacations to employees who were in the active employ of the company, or laid off or retired, or on leave of absence on December 31. That kind of provision does not appear in the Swift contract. Under the Swift contract, even persons who, at the time of the closing, were on layoff, or were retired, or were on leave of absence were not entitled to vacation pay. Thus there was no exception to the requirement that the employee be on the active payroll on the specified date in order to qualify for vacation. The contract in

Schneider obviously was different. "The contract language explicitly covers the situation in which an employee is laid off, retired, or on leave of absence, but there is no mention of a plant shutdown." 456 F. 2d at 371.

Similarly, in *Baldwin-Montrose* the vacation pay clause required that a person be "an employee" on the qualifying date and that he or she must have worked thirty pay periods during the preceeding twelve months. Again, there was no provision which required the employee in that contract to be on the "active payroll" as was the requirement in the Swift agreement.

Thus, all that can be said about these two Sixth Circuit decisions is that different contract provisions produce different results.

Petitioners also contend that the opinion of the Sixth Circuit in *Local 186, United Packinghouse Food and Allied Workers* v. *Armour and Company*, 446 F. 2d 610 (1971), *cert. denied*, 405 U. S. 955 (1972) "raised the same basic issue in the same industry and involved a local of the same union involved in this case" and concluded that vacation pay was due following a plant close-down. But, of course, there is no uniform "basic issue" common to these cases. The Sixth Circuit in *Local 186* had before it a different contract. There was *no provision* in that contract requiring an employee to be on the active payroll.

Moreover, it is significant to note, with respect to the issue of whether Amalgamated made a rational judgment as to the probabilities of winning or losing the vacation pay grievance in arbitration, that, at the time of the settlement between Swift and Amalgamated, the district court in *Local 186* had held that the employees were *not* entitled to vacation pay. The Sixth Circuit decision in that case was rendered after the settlement had been made. The district court opinion is reported by the CCH Labor Service, 66 LC Para. 12,074.

CONCLUSION.

The court of appeals correctly concluded that the language of the collective bargaining agreement between the Respondents Swift and Amalgamated in force in 1969 precluded vacation pay when the plant closed on November 29, 1969. That conclusion is compelled by the unambiguous language of the instrument itself, the bargaining history and the practices which had been followed for 20 years between the parties. There has been no failure by the Eighth Circuit to follow decisions of this Court. There is no conflict with any decision of any other circuit because no other circuit has considered a collective bargaining agreement with the "active payroll" language in it.

For the foregoing reasons the Respondent Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, prays that the petition for a writ of certiorari be denied.

Respectfully submitted,

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